UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

DAOL REXMARK UNION STATION, LLC, *et al.*,

Plaintiffs,

v.

UNION STATION SOLE MEMBER, LLC,

Defendant.

----------x

New York, N.Y.

22 Civ. 6649 (GHW)

Remote Conference

November 3, 2022
2:00 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

MORRISON COHEN LLP
Attorneys for Plaintiffs
BY: AMBER R. WILL
Y. DAVID SCHARF

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP
Attorneys for Defendant
BY: DAVID E. ROSS
DAVID J. MARK

THE COURT: This is Judge Woods. Do I have a court reporter on the line?

THE COURT REPORTER: Good afternoon, Judge. Kristen Carannante.

THE COURT: Good. Thank you.

Let me begin by taking appearances from the parties. I am going to begin by taking appearances from counsel for plaintiff.

Counsel.

MS. WILL: Thank you, your Honor. This is Amber Will and Y. David Scharf, from Morrison Cohen, for plaintiff.

THE COURT: Good. Who is on the line for defendant?

MR. ROSS: Good morning, your Honor. David Ross and David Mark, from Kasowitz Benson Torres, for USSM.

THE COURT: Good. Thank you very much.

I'm sorry. Is there someone else who would like to identify themselves?

So let's begin.

So first, let me just remind you all that this is a public proceeding. Any member of the public or press is welcome to dial in to this conference. I am not presently monitoring whether third parties are monitoring the conference, so I ask you to just, please, keep that possibility in mind.

Second, please state your name each time that you speak during the conference. I ask that you do that even if

you have spoken previously.

Third, please keep your lines on mute at all times except when you are intentionally speaking to me or to the representative of a party.

Fourth, I am inviting our court reporter to let us know if she has any difficulty hearing or understanding anything that we have to say here today. If she asks you to do something that will make it easier for her to do her job, please do it to the extent that you can.

And finally, I am ordering that there be no recording or rebroadcast of all or any portion of today's conference.

So counsel, I scheduled this as an opportunity to hear from plaintiff regarding the proposed motion for summary judgment that's the subject of their premotion conference request letter. So let me just say that I have read both the letter that was submitted by counsel for plaintiff as well as the letter submitted by counsel for defendant on the 2nd of this month. Still, it can be helpful for me to hear from each of you about the anticipated arguments in order to help think about how the motion should thus be scheduled, among other things.

Let me begin with counsel for plaintiff. What's the basis for the proposed motion?

MS. WILL: Thank you, your Honor. This is Amber Will for plaintiffs.

Lender is entitled to summary judgment on its single claim for a declaratory judgment because the only dispute here is that of contract interpretation, which the Court can decide as a matter of law.

Now, lender's position, as you mentioned, is well articulated in the letter that we submitted to the Court on October 26, 2022, which is filed at ECF Docket No. 51. The Court is also well-versed on these issues after the briefing that was submitted before the preliminary injunction hearing that was held on August 23.

I will briefly kind of summarize why lender is entitled to summary judgment and then address some of the points raised in USSM's response letter, as well.

First and most importantly, summary judgment is warranted here because the sole issue before the Court is interpreting unambiguous contractual language. It is well settled that clear and complete writing should be enforced according to its terms, and here we have both a pledge and security agreement as well as a mezzanine loan agreement.

Section 9(a) of the pledge agreement and Section 5.2.2 of the loan agreement unambiguously provide lenders certain rights if USSM is in default. It is undisputed that USSM has been in default since May of 2020. And as highlighted in the preliminary injunction hearing before the Court, the issues here are contractual, whether lender could do what it did.

USSM's response letter supports the focus on contractual interpretation. In fact, in its opposition letter, on page 3, USSM's first argument regarding merit is based solely on contractual interpretation. USSM has not identified any discovery that would further support their position on these contractual issues. Rather, they intend to make the same arguments that were presented and rejected at the preliminary injunction hearing.

Lender's request for a summary judgment briefing would be able to resolve these issues as a matter of law, and because the contract includes unambiguous language that can be resolved as a matter of law, discovery is unnecessary in this case. The documents that are relevant to the single declaratory judgment claim and USSM's defenses have already been provided or are in the possession of both parties. There are no other documents that are necessary to actually resolve the claim that is pending before this Court.

In fact, even though USSM discusses a lot of discovery that they have requested, none of those requests touch on a valid defense that would actually preclude lender from winning on summary judgment. Particularly, USSM relies on finding documents that would relate to lender's predecessor in interest interfering with an investment and how that could have allowed USSM to become current on its loan. But regardless of whether that evidence exists, the current posture of this action makes

the discovery legally insignificant. If USSM had sought an injunction in advance of the foreclosure five months or so ago or objected in some other way before the sale had proceeded, we would have been in a different position. But right now, the foreclosure sale happened on June 14 of 2022, almost five months ago. The sale has concluded. Lender purchased the collateral by a credit bid, and lender transferred the collateral to Daol Rexmark.

The discovery that USSM wants would not unwind that foreclosure sale. And discovery needs to be targeted for evidence on a triable, material issue of fact, meaning that it has to be legally significant. As USSM identifies on page 2 of its letter, "If discovery that is essential to justify an opposition is outstanding, a summary judgment can be deferred or denied," but the discovery requested here is legally irrelevant, given the posture that we find ourselves in, that is, the foreclosure has already happened.

Moreover, discovery is also unnecessary because none of the affirmative defenses preclude summary judgment. USSM has the burden to demonstrate that judgment could be found in its favor on the basis of a particular defense. And as I just discussed, none of these defenses could actually unwind the foreclosure sale.

But regardless, the affirmative defenses that they have claimed contain bare and conclusory statements that can be

completely disregarded as a matter of law, and I just want to touch on two of them that are referenced in the letters that were submitted to the Court.

The first on the lack of standing or capacity: Now, lender produced documents that show the transfer of the collateral from Kookmin Bank to Daol Rexmark Union Station in its initial disclosures, and that documentary evidence demonstrates that USSM's defense on that fails. The other defense that USSM relies upon in its letter toward the end on page 3 is that lender is not entitled to a condemnation award above the loan amount, but that is not an issue before this Court. The unambiguous language and the claim before this Court is based on Section 5.2.2 which explicitly provides lender the right to serve as USSM's attorney-in-fact during a condemnation proceeding that occurs while USSM is in an event of default. The distribution of a condemnation award, if it happens, is an issue properly before the court in D.C. The issues before this Court, no matter how many times USSM tries to conflate them, are only about the loan agreements and the rights exercised thereunder. But ultimately even this purported affirmative defense that lender cannot receive a condemnation award in excess of the loan amount does not actually preclude a judgment in lender's favor on the single claim for a declaratory judgment. And for those reasons, we think that lender is entitled to summary judgment prediscovery.

THE COURT: Thank you. This is not the most pertinent of my questions, but I would like to start with it because it is where you ended. What is your view of the effect of the foreclosure on the distribution of any funds from the condemnation? We know that defendants, for reasons known to them, in their wisdom, chose not to file for bankruptcy and potentially retain the upside of the equity value through Chapter 11 or other bankruptcy proceeding as a result of which you assert -- have asserted that you rightfully foreclosed on the equity. What's the effect of that fact on the distribution of the condemnation amount? In other words, to whom is the condemnation amount owed? Let me just hear a little bit about your views regarding the effect of the ownership of the equity of this company on the entitlement of its what you assert to be former owners to a portion of that distribution? I ask because it is the last thing you raise, also because I'm curious to help me understand the issues presented, maybe not on this motion, but in the litigation more generally.

Go ahead.

MS. WILL: Thank you, your Honor. Again, this is Amber Will for plaintiffs.

In response to that, lender does own the ownership interest in USI, and because the condemnation award is when occurs in D.C. would be going to USI, it would be our position that would be under lender's control. However, there is a

point in time from the condemnation which was filed on April 14, 2022 and before the foreclosure sale happened on June 14, 2022, that if there are any proceeds during that time that the Court feels is better distributed to USSM as the former owner of USI, that would be a decision for the district court in D.C. to make once the condemnation award issue has been presented before that contract.

THE COURT: Thank you. Let me just pause you. This is an issue not before me, so I am just asking out of curiosity. At least it is not before me at this time.

Why would the -- what would the basis be for the argument or what do you anticipate the argument to be that would entitle the former equity owner to a portion of the condemnation award? Why wouldn't the right to a payment of the condemnation award not be just, I will call it, part of the rights inherent in the ownership of the asset, that is, the company that would inhere to the company unless and until the company declared a distribution or dividend to the equityholder?

MS. WILL: Yes. Amber Will for plaintiffs.

Lender disagrees with the idea that USSM as the former owner would have any interest, but the D.C. Court has referenced in the past that it is not ruling against the idea that USSM could have a financial interest in the condemnation award, and that is what we are going off of.

THE COURT: Thank you. Good. Understood.

So counsel, you have referred in your comments here to the threadbare nature of the defenses raised in the answer. Can you comment more on what the point of that is here as I am evaluating the proposed motion for summary judgment? In other words, if they are insufficiently pleaded under *Geox* and Second Circuit law, how does that impact my assessment of the proposed motion for summary judgment, which is not a motion to strike?

MS. WILL: Yes, your Honor.

As a matter of law, there is case law, including SDNY case law, that says that affirmative defenses that contain bare and conclusory statements are not enough to defeat a summary judgment motion. There has to be some facts alleged. There has to be a basis for discovery that would actually demonstrate that judgment could be found in the defendant's favor on a particular defense. In this case, when we are looking at the first, second, fourth, fifth, sixth, seventh, and eighth affirmative defenses, they are all very bare statements that are just statements of legal conclusions, rather than having any factual allegations to support them.

THE COURT: Thank you. Let me just pause you on that.

You and, I am sure, counsel for defendants are all aware of the pleading standard for affirmative defenses under the Second Circuit's holding and ruling in *Geox*.

What I want to understand -- they pleaded them as they

have. What I want to understand is I will call it the procedural nuance here. I understand that you are not bringing a motion to strike these affirmative defenses because they are inadequately pleaded, because they state no facts, as you argue, to support the defenses, but this is a Rule 56 motion, so can you say a few more words about how I should be thinking about this from a procedural perspective? I think you said that they need to present facts that would support the affirmative defense for purposes of the summary judgment motion, but you are referring to the absence of facts that they have presented in the answer which are different arguably from the facts that they may present in affidavits or otherwise in response to the Rule 56 motion. Why would I just look at the sufficiency of the facts stated in the answer for evaluating the 56 motion?

MS. WILL: Thank you.

Our point is that you would look at the -- the Court would look at both. It would not just be solely looking at the affirmative defenses that are pleaded in the answer, but also looking at the arguments that are raised in opposition of summary judgment. And specifically I am looking at an SDNY case that was decided in September of 2022 called *Town Square Media, Incorporated v. Regency Furniture*. I can give the Westlaw citation if desired, but it stands for the proposition that a plaintiff's motion for summary judgment, if it's

meritorious absent the assertion of an affirmative defense, in order for the defendant to avoid summary judgment, they have to adduce evidence which, viewed in the light most favorable to defendant, would permit judgment for defendant on the basis of that defense. And based on what we have here, looking at the answer and looking at the letter that was submitted by USSM that doesn't identify any evidence that would be able to preclude a finding in lender's favor, we think that they have not met that burden and that summary judgment would be appropriate here.

THE COURT: Thank you.

In defendant's letter, I understand them to be arguing that if I grant your application it will have the effect of being equitable relief. In other words, they are saying that a declaratory judgment upholding the effect of what I understand to be a nonjudicial foreclosure action under the UCC would, by virtue of the fact that I would grant the relief, be properly considered as an equitable order, ordering foreclosure. What is your response to that argument?

MS. WILL: Our response is that this is really an outlaw issue. It is contractual in nature. And the case law is very clear that because USSM did not object to the foreclosure sale, they only have a basis for monetary damages at this point, and there are no counterclaims in this case, there are no allegations for monetary damages. They can simply

not unwind the sale that has already occurred and that's been well settled in New York law.

THE COURT: Thank you.

Am I being asked to transfer ownership of the shares such that this is a judicial act by virtue of the request for entry of declaratory relief here, as I understand defendants are framing it, or is this something else?

MS. WILL: No, your Honor. The ownership shares have already been transferred based on the foreclosure sale. The declaratory judgment is just to validate the rights that have been exercised based on the clear contractual provisions in the loan agreement and the pledge agreement.

THE COURT: Thank you. Thank you very much.

Counsel for defendant, let me hear from you.

MR. ROSS: Thank you, your Honor. David Ross.

I'm going to try to address the points that you discussed with Ms. Will, but please let me know if I haven't addressed them all and you would like me to cover them.

First, our position is fundamentally set forth, first, in the letter that we sent you yesterday, dated November 2. I am not going to repeat what's in that letter, but fundamentally, your Honor, we are at a case in which you have granted a preliminary injunction. So there is no urgency whatsoever to the application that's being made for you now to decide summary judgment at this stage of the case. No facts

have been put before you as to why there would be any urgency to rush to any judgment in this matter given that there is a pending preliminary injunction and no complaint that it has been violated in any way.

Number two, your Honor entered a scheduling order on about September 13, and that scheduling order provided for standard, full discovery——both fact discovery and expert discovery——and that discovery would end in February, followed by summary judgment motions being filed by mid March. Nothing has been put before you as to why discovery should not proceed in the ordinary course.

What has actually happened here is that, immediately upon our being able to serve document requests, we served them on the other side, and a month later we got "pound sand" or the equivalent of a stiff arm on every single request that we served. The position has been: You are entitled to nothing, we will give you nothing, and nothing is what you will get.

They produced five documents to us voluntarily, they say, about standing because that's what they want us to know, only what they want to show us relating to Daol. We are entitled to inquire as to the facts with respect to which their claim is based, how they got the rights, what rights they had, who they transferred them to, and the fundamentals of the foreclosure transaction which underlays their claim. I can't tell until I see it what they actually did and how they did it

and whether or not any part of it was inequitable or improper. They are only showing us and you what they wanted to put in their injunction papers.

Second, we have alleged affirmative defenses that, if proven, would demonstrate that they are not entitled to the relief that they seek. Whether it is strictly called equitable relief or not, I don't think your Honor has to decide at this moment. The allegation is that they and their predecessor in interest actively interfered with the financing of the property in such a way as to undermine the owner's ability to refinance the loan, get an equity infusion, pay off the loan.

Second, later in time, they themselves interfered directly with our client's ability to obtain funds from tenants for the property, find new tenants, explore new opportunities, and interfered with our tenant Amtrak.

THE COURT: Can I pause you just a little bit on the predecessor issue?

MR. ROSS: Yeah.

THE COURT: When you say predecessor, do you mean their corporate predecessor or the entity that owned these loans before them?

MR. ROSS: I mean the mortgage lender, your Honor, but Rexmark, through Mr. Rebibo, was also in direct contact at that time with Wells Fargo and BlackRock. He was protesting their conduct as improper and violative of the parties' rights at

that time, in writing, and that's part of the discovery that I want to take related to that.

As it turns out, we believe Mr. Rebibo and Rexmark and Kookmin also got in bed with the mortgage lender in seeking to undermine our client's rights and interfere with them. So --

THE COURT: Can I pause you on that? I am just curious about what I will call the transfer of that liability. So I'm going to assume for these purposes that the prior holder of these loans did interfere. Why does that give rise to a defense against the enforcement of the obligations under the note as opposed to a claim against the prior entity? In other words, why isn't the actor the person who is liable for the alleged bad acts? Why does the problem travel with the note? What cases do you have to support that the prior owner of an asset's conduct diminishes the value of the asset once transferred?

MR. ROSS: Your Honor, David Ross.

The note was transferred or assigned to Kookmin from the mortgage lender or lender entities, so its defects travel with the note itself. They inherited whatever problems that it had. I don't have a case on my table waiting to hand you, but I can --

THE COURT: Let me just ask about, you say whatever problems it had, referring to the loan. What is the transitive property here, that conduct by owner of asset that therefore

contaminates the asset such that it's transferred together with the asset as opposed to bad actor remains liable for their bad act? Is there a case that supports that proposition?

MR. ROSS: I think there are, your Honor, but New York General Obligations Law also says that when you transfer an interest, it carries with it any claims that are against that interest. So I don't -- I think we can, if you like, we will dig it out and submit it to your Honor, but it's a fairly standard proposition that it doesn't wash -- the transfer doesn't cleanse or wash any defects or violations that may have occurred that accompany that interest.

THE COURT: Thank you. I look forward to any case law that you can put in front of me that supports that proposition in this context in a nonfrivolous way. I just note that it is a very expansive argument that you are proposing, namely, that the conduct by any person that owned an asset travels with the asset itself.

MR. ROSS: Yes, your Honor. I'm sorry. I didn't mean to interrupt you.

THE COURT: That's fine. Please go ahead.

MR. ROSS: What I was also saying is that Kookmin Bank, through Rexmark and Mr. Rebibo, also wrongfully participated themselves in undermining our client's interest, so it is not only the conduct of the predecessor, but the conduct of the plaintiff itself that we are pursuing. I think

that -- I think this is equitable in the sense of the declaratory judgment being an equitable remedy that arises in the context of a foreclosure and asks for you to decide and declare what the rights of the parties are in this context. We have cited --

THE COURT: Can I just pause you on that? I saw the case that is -- you heard the question that I was asking counsel for plaintiff about this. The act that they took that they assert led to their ownership of the asset was a nonjudicial foreclosure action under the UCC. Are the cases that you are pointing to cases that involve nonjudicial foreclosures of that type or are they cases in which the court ordered foreclosure? So, in other words, is my *post hoc* recognition of a nonjudicial foreclosure the same as a court ordered foreclosure?

MR. ROSS: I think the cases that we cited to you involve judicial foreclosure, your Honor, but I don't think that that changes the answer to the inquiry.

The essential nature of what's going on here is that it arose out of a foreclosure, and they are seeking a declaration as to rights and I believe as a matter of law that you are entitled to consider equitable defenses. The effect of the judgment in this case would be the same whether or not whatever this original source was. So I think you look to the nature of the relief that's being sought.

With respect to the affirmative defenses, your Honor, as you point out, clearly, no motion has been made to strike our affirmative defenses or suggest that they are inadequately pled, only that at this stage of the proceeding, having just answered, we are also being put to the burden before conducting any discovery and with a stiff arm being put out barring us from getting any documents. They would like to say that we can't put any meat on the bones yet. And respectfully, your Honor, we think that that is the height of depriving us of due process in order for us not to be able to inquire.

For example, even as to the simple question of standing, of Daol's standing, they say we have to take the five documents they received, we are not entitled to get all documents about how Daol acquired this or any communications about it, and we then have to accept as fact their assertion of what these documents show. I don't know if they are legitimate. I don't know when they were created. I don't know what else their files show. I don't understand why I'm not entitled to inquire as to a fundamental element of their claim that they own these rights and that they properly acquired them.

We are at the start of a case, and while they may have been entitled to a preliminary injunction based on your Honor's evaluation of what was put forward, that's not the ultimate determinant in this case, and I believe that I am entitled on

behalf of my client to get the documents that relate to the fundamental issues in the case, including these affirmative defenses that we asserted, but also the fundamentals, for example, about the drafting and negotiation of the documents. How did the clauses that we are disputing and that are the subject of this supposed clear and unambiguous contract, how did they get in there? Who drafted them? Why were these certain sentences added to the end of certain clauses that are not in the original mortgage provision on condemnation?

They are telling you, Don't look behind the curtain, you can only look at what we decide to show you, and I think we are entitled to investigate those matters. And given that there is a preliminary injunction in place, I also think that it is fundamentally unfair to say we have got to make our case at this moment in time based only on the opaque disclosure that we are given and we are not going to be able to use the next 12 weeks to learn anything. If they are not giving us any documents, are they also not giving us any witnesses? And are they going to tell us we can't ask the witnesses these questions? And if we can ask them these questions, why can't we get the documents about the questions?

So to me, I think we are being essentially completely closed out of our rights unfairly and improperly, and what I think your Honor should do is defer any briefing on this summary judgment, let us get the documents that we are entitled

to, and we may have to bring a dispute to your Honor in the next two weeks, because if the stiff-arm approach continues from the other side——and perhaps your Honor will give some indication of your views on that, but if that continues, then we are going to make -- ask your Honor to allow us to move to compel, and all of that is going to bog down the discovery that we are entitled to. If we are being told, no, you can get nothing at this point in this case either about our claims or your defenses and you merely can sit there bound and gagged at counsel's table, then I don't think that that is the kind of proceeding that's appropriate.

THE COURT: Good. Thank you very much.

Let me turn back to counsel for plaintiffs. I want to ask about a couple of defendant's points which are well made.

First, counsel, you have looked at Rule 56(d) and the case law that describes the circumstances in which a Court permits full briefing on a summary judgment motion and grants summary judgment prior to the completion of discovery. There is clear case law in the Second Circuit which I'm confident the parties have looked at. Aware of the standard and the Circuit's description of the circumstances in which they have told us district courts that we may proceed to decide on a motion for summary judgment and circumstances in which discovery has not been completed, counsel for plaintiff, let me hear from you about why it is that you think that this motion

will succeed in the face of what I expect we all anticipate will be a response based on Rule 56(d). And I note that one of the factors——I'm going to paraphrase it, because I don't have the language in front of me, I apologize——looks to the reasons why the discovery has not been made available here. I anticipate that defendant is going to say, based on their comments here, that it hasn't been made available because it's early days in discovery and because they said that you have not yet given them relevant documents. So given the anticipated 56(d) opposition, counsel for plaintiff, why is the time ripe for this motion? And as you are responding, you should respond, please, to the related argument that there is no rush given the pendency of the injunctive relief.

(Continued on next page)

MS. WILL: Thank you, your Honor. This is Amber Will for plaintiff.

Again, without repeating myself too much from before, a lot of the points raised regarding the predecessor in interest's supposed bad acts, the interference with tenants and leases, which is actually just the enforcement of contractual language based on USSM's default, all of those kind of equitable defenses that USSM keeps relying on and keeps arguing that are relevant to this case, even if there was evidence to produce -- to support those arguments, that would not preclude a finding in lender's favor. There's just not -- the evidence for those defenses would not actually prevent lender from succeeding on its summary judgment for the declaratory judgment claims. That is why it's relevant now before discovery, before there is wasted resources, and the parties go through four months or so for discovery, when it's unnecessary. It's irrelevant. It might be interesting, but it's actually insignificant or legally insignificant to the issues that are before the Court. Specifically, in regards to the discovery arguments that USSM has made in saying that we've given them a stiff arm, we have told them to pound sand and say that we're not getting nothing --

THE COURT: I don't need argument on the discovery issues here, or the anticipated potential discovery issues. If those arise, I'll hear from the parties. I'll comment on this

at the end.

Just from a practical perspective, counsel, if I set summary judgment briefing now and I do not stay discovery, the likelihood that I'm going to decide this proposed motion before discovery ends under the existing case management plan and scheduling order is honestly very low. How does that affect your argument regarding I'll call it the efficiency and the potential of such a motion to reduce the burden on the parties? Again, unless I were to stay discovery—-which no one has asked for here and I'm not taking a position on it—-discovery would happen in parallel with the briefing and resolution of this motion. Briefing will take some amount of time, which we will determine shortly, and then it will take me some time to resolve it. That will gobble up, I expect, a good portion of the fact discovery period, at a minimum. So how does that affect the argument regarding the value of bringing this motion now?

MS. WILL: Well, even if discovery -- sorry. This is Amber Will for plaintiffs. Even if discovery continued through the summary judgment briefing, at least with the summary judgment briefing, there would be context for any discovery disputes that would also be brought before this Court. As USSM has mentioned, we had a meet-and-confer yesterday. We asked to go through the requests one by one to understand why all documents related to Union Station was necessary for their

defenses. They refused to go into detail. So we think that there are going to be factual -- or not factual -- we think that there are going to be discovery disputes that will probably come before this Court as well, and with the summary judgment motion being briefed, it will give the Court context as to whether discovery is necessary and how to rule on those motions.

THE COURT: Thank you. Good.

So I'm going to go ahead and set a briefing schedule for the motion now. I want to talk about structure of the motion. I'm going to make a request for the parties' views regarding two alternative approaches here.

The default approach is the standard approach in which the motion will be filed, an opposition, and then a reply would follow. An alternative that I have seen and used in other circumstances where there is an anticipated Rule 56(d) opposition is this: I have in the past, in appropriate occasions, not all occasions, structured the summary judgment motion briefing so that rather than a plenary opposition addressing the 56(d) argument, as well as substantive opposition to the motion, I have instead scheduled an opportunity for the opposing party, who's opposing on 56(d) grounds, to submit the affidavit which is required for such opposition under Second Circuit case law, and a memorandum of law that's limited to the 56(d) issue, then a reply addressing

the 56(d) issue. Only after I've resolved the 56(d) issue--namely, whether or not I'm going to actually entertain the fulsome substantive motion--then do I ask for substantive briefing in opposition to the motion from usually the plaintiff but here defendant. That is an alternative structure. So I'm going to describe them as standard and the 56(d) options, and I want to ask for each of your respective views on those options for the potential briefing structure here, beginning with counsel for plaintiffs. Counsel?

MS. WILL: Thank you, your Honor. Amber Will for plaintiffs.

Lender would ask for the traditional default structure of the summary judgment motion, particularly because the defenses that have been raised here are legally insignificant and that is what USSM is seeking discovery on, and the other issues have already been brought before the Court in the preliminary injunction briefing.

THE COURT: Thank you.

Counsel for defendant, let me hear from you.

MR. ROSS: David Ross, your Honor. I think your 56(d) option is very sensible in this context, given the discussion that has happened and the letters that have been submitted and the obvious potential that you may conclude that we are correct with respect to the 56(d) issue, and that obviates the need for further briefing at that point.

THE COURT: Thank you. Good. Thank you very much, counsel. I appreciate that. Let me turn to the briefing schedule.

I'm going to adopt the 56(d) option here. I appreciate that there is an attendant issue with this option--namely, that from plaintiff's perspective, it will stretch out the time for resolution of the motion. I'm going to try to mitigate that potential concern by recognizing the fact that the scope of the opposition will be more limited than it would be in the context of a plenary opposition and that therefore, the reply to the 56(d) affidavit will be more narrow and focused than I'll call it the standard reply to the motion for summary judgment itself. So what I'm going to do is set a briefing schedule for the motion for summary judgment. I'll start with the proposed moving date by counsel for plaintiff. I'll solicit that from you, and then I will set a schedule for the remaining submissions with some instructions about what I expect to see after hearing from each of you.

Let me start with counsel for plaintiff. When would you propose to file your motion?

MS. WILL: Lender would file its motion by November 23rd --

THE COURT: Thank you.

MS. WILL: -- which is a Wednesday.

THE COURT: Good. Thank you. Understood.

So this is my proposal. I propose to accept the proposed filing date, which is the 23rd. I propose that the opposition, which, as I understand it, will be limited to an opposition addressing the defendant's proposed argument focused on Rule 56(d) -- please look carefully at the case law in this space from the circuit. I'm confident that you will. They say that there are certain things that must be provided to the Court, so please look at that carefully. I've seen circumstances where parties don't do that, and that's not in the best interest of their client. So please look carefully at what it is that you're supposed to present, most importantly an affidavit describing the things that the circuit says that it should describe. So the opposition will be due three weeks after the service of the motion. Any reply will be due one week after. As I said, this is an expedited schedule so that I can address the 56(d) issue relatively promptly, I would hope, and then would turn to substantive briefing in the event that I decide that defendants' arguments are insufficient. I recognize that that schedule straddles the holidays, and that's the reason why I'm proposing three weeks as the date for the opposition as opposed to a potentially shorter period of time.

I note on the 56(d) issue that that does not require necessarily that you have full information regarding the content of the moving brief, and as a result, I expect that much of what you would put in front of the Court regarding the

grounds for opposing it under Rule 56(d) grounds could be thought about and developed, really starting now.

Good. So that's my proposed schedule. Counsel for defendants, can you make that work?

MR. ROSS: Yes, your Honor. Thank you. I have something to raise, but I'll wait till we finish this part.

THE COURT: Good. Thank you.

So the schedule is as I just described it. The motion itself is due no later than the 23rd of November; any opposition, which will be limited to any issues pertaining to Rule 56(d), will be due no later than three weeks following the date of service of the motion; any reply will be due no later than one week following service of the opposition.

Let me just say a few brief words about the summary judgment motion practice generally. I don't need to say this, and some of what I'm about to say only applies should we get to full substantive briefing on the motion for summary judgment, but since you're all here, I'll take your time to flag these issues.

As you're presenting your motion to the Court, counsel for plaintiff, obviously you should review the court's local rules and my individual rules. Each side will need to comply with the local rules regarding 56.1 statements. When you prepare your 56.1 statement, counsel for plaintiff, please support each statement of fact with the citation to record

evidence that will be presented to me in connection with the motion. As you're presenting that record evidence to the Court, please do so with as much specificity as possible. So if you're pointing to a document, please point to the line or page number. Should we get to the point in the case where the relevant evidence includes things like depositions, I would expect that they would include pin cites to relevant testimony and references to specific page numbers for any relevant document. Should we get to the point where an opposition to a 56.1 statement must be filed, please follow my individual rules of practice with respect to them. My individual rules require that the responding party cut and paste their adversary's 56.1 statement and that you include, immediately beneath the asserted statement of fact by I'll say the moving party—-the person that has propounded the relevant fact—-your response. Remember that under our local rules, you can admit a statement of fact but a 56.1 statement is not an answer, so you cannot categorically deny a statement of fact asserted in a 56.1 statement. Under the local rules, if you categorically deny a statement by saying "Disagree" or "Denied" or any words to that effect, it's actually treated as an admission of that statement. Instead, if you disagree with a statement of fact asserted by your adversary, you have to present your version of the relevant fact and you must present record evidence that supports your view. So again, please just look at the local

rules and my rules and comply with them.

Although my emergency rules of practice in light of COVID are still in effect, with respect to the provision of courtesy copies of documents, please comply with my regular rules. My regular rules require that you provide me with courtesy copies of the motion papers and supporting documents when it's fully briefed. Under the 56(d) option, that would mean after the 56(d) briefing structure is fully briefed. That would be moving papers, opposition, and reply. And so you should submit full courtesy copies in accordance with my normal rules, given that.

If there are large electronic files that are hard to upload on ECF -- I think that's unlikely in the 56(d) option, but for example, were we to get to more substantive summary judgment motion practice, if you were to provide me, for example, with the depositions or if there were other media, please give them to me at the time that you submit the fully briefed motions with your courtesy copies. You should ideally do that in the following manner: Reach out to my courtroom deputy, Ms. Joseph. Her name is Wileen Joseph. She will send you a link that you can use to upload the relevant documents to our system. That is the preferred route. If, however, you are unable to make those arrangements, the default rule is that you should provide the Court with copies of those electronic documents on a USB drive or CD or other media.

Good. So I think that's all that I wanted to say on this topic. I'm looking forward to seeing your papers.

I have a couple of brief comments, and then I want to turn to counsel for each side to hear if there's anything else that you'd like to talk about.

Let me begin actually with that last thing first. Counsel for defendant, you said that there was something else you wanted to raise with me.

MR. ROSS: Yes, your Honor. David Ross.

I just want to be clear that if we are unable to resolve disputes with plaintiff as regards discovery matters, we should follow your standard procedure for a joint letter regarding the discovery dispute? I just wanted to check if that is what we should do.

THE COURT: Yes, that is what you should do. There's a possibility that I'll refer the discovery issues to the assigned magistrate judge, but I have not yet decided to do that. I may, having heard a preview of the potential issues. But assuming I haven't done that, then please comply with my individual rules.

MR. ROSS: Thank you, your Honor.

THE COURT: Good.

Counsel for plaintiff, anything else from you?

MS. WILL: Nothing further from plaintiffs. Thank you.

THE COURT: Thank you.

Please indulge me for just a moment. As you both know, summary judgment motion practice can be very expensive, so I'd like to just spend a moment to talk about settlement issues at this stage of the case. I really would like to encourage the parties to work to see what you can do to resolve the case. I know that you are surely working on the side to try to resolve the case. I strongly encourage you to rededicate your efforts to that, with the hope that perhaps you can save some money in this process. I started with my questions about the economics of the dispute earlier. I heard a little bit about the economics of the dispute during our initial pretrial conference, which, as I understand it, may really be focused on the amount by which the condemnation proceeds may exceed the value of the debt that was the subject of the foreclosure action. I'm not going to take a position on that. I think that my hope is that the parties--and in particular the lender--will be thinking about the extent to which retaining the full condemnation proceeds is I'll call it a windfall and whether or not the parties should be talking about a way to potentially resolve how to deal with any potential proceeds that exceed the principal and accrued interest on the loan. This, frankly, seems like the kind of case where parties working together in good faith should be able to work to resolve these issues. I know that you are

working together in good faith. I hope that you are. If there's anything that I can do to help the parties work to resolve any of these issues by referring you to either a magistrate judge or to our excellent mediation program, which is free, I'd be happy to do that, and I strongly encourage you to think about that now and to be thinking about whether and to what extent there's a way to carve up the potential upside here in a way that's fair and equitable, and to strategize about how to maximize that return for both sides. So if there's anything that I can do, please let me know; I'd be very happy to refer you to one of those resources. And I strongly encourage you, in this window before the motion is filed, to talk about these issues and to see whether there's a way to work these issues through. If you think that you're making progress and that you'd like to focus on talking about a resolution instead of actively litigating the issues that you're prepared to bring to me, please feel free to write me. I'm happy to modify the schedule to permit the parties to focus on reaching an amicable resolution here, which I would hope could be framed based on the parties' reasonable economic expectations for a return, given the nature of their investments.

Good. So, anything that I can do at this point? And again, you don't need to say anything in particular. The main thing I'm curious about is, I just want to encourage each of you to think about this, and encourage each of you to let me

know if you think it would be helpful for me to refer you to one of those resources. Remember that asking me to do that doesn't mean that you're going to settle; it doesn't mean that you're caving; it just means that you're willing to have an informed conversation about a potential resolution. So I'm not going to ask either of you to come to the table on that now, or to take a position on it now during this call. I just strongly exhort you to engage with your clients and each other to see if there may be a path forward.

So that's all I've got. Anything else, counsel for plaintiff?

MS. WILL: Thank you, your Honor. Just a point to add to what you had just said. The parties are still disputing whether Amtrak has actually properly taken the leasehold interest in Union Station, so the just compensation issue is not even pending before the DC court at this time either. So those kind of economics are still far in the future, from our end. But other than that --

THE COURT: Understood. I appreciate that. My only comment is that your interests may be aligned, to the extent that the defendants are not asserting that they don't need to pay the debt that they borrowed. And so whether that means continuing the leasehold or otherwise or condemnation, in any event, these are issues that may be conjoined, and it may be also that the parties would think about how best to handle this

litigation in conjunction with the DC litigation. In any event, I appreciate the clarification, counsel. It's very helpful. I just encourage you to keep on thinking creatively and constructively, as I'm confident that you are.

Anything else, counsel for defendants?

MR. ROSS: No, your Honor. David Ross. But thank you for your comments. They are much appreciated and understood.

THE COURT: Good. Thank you.

So counsel, I'm going to adjourn this proceeding. You should feel free to drop off.

Parties that are joining us for the Bitsadze conference, please hold on the line on mute. We'll be with you in a moment.

o0o